No. 80-251

In the Supreme Court of the United States

OCTOBER TERM, 1980

BERNARD ROSTKER, DIRECTOR OF SELECTIVE SERVICE, APPELLANT

v.

ROBERT L. GOLDBERG, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF FOR THE APPELLANT

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QUESTION PRESENTED

Whether the exclusion of females from the draft registration provisions of the Military Selective Service Act, 50 U.S.C. App. 451 *et seq.*, invidiously discriminates against males in violation of the Due Process Clause of the Fifth Amendment.

* Other appellees are David Sitman and Owen F. Jones. On July 1, 1980, the district court certified a class, pursuant to Rule 23(b)(2), Fed. R. Civ. P., of all males registered or subject to registration under Presidential Proclamation No. 4771 and the Military Selective Service Act or liable for training and service in the Armed Forces of the United States under the Act (J.S. App. 2a–4a, 44a). As we advised the Court by letter of August 22, 1980, Henry R. Sheppard, Acting Pennsylvania State Director of Selective Service, and Local Board No. 138 in Philadelphia, Pennsylvania, originally also were defendants. However, there are at present no local boards and those offices have been vacant for some years. Although Joseph P. McCullough was designated "provisional" State Director of Selective Service for Pennsylvania on August 1, 1980, he has not been involved in the current registration process and, at present, has no official function and receives no salary. Accordingly, Mr. McCullough has not been treated as a party to this appeal.

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OPINION BELOW

The opinion of the district court (J.S. App. 1a–43a) is unreported.

JURISDICTION

In July 1974, pursuant to 28 U.S.C. (1970 ed.) 2282, a three-judge district court was convened to hear appellees' challenge to the constitutionality of the Military Selective Service Act, 50 U.S.C. App. 451 *et seq*. The district court held unconstitutional and enjoined enforcement of the male-only registration provisions of the Act, 50 U.S.C. App. 453, by order dated July 18, 1980 (J.S. App. 44a–45a). A notice of appeal to this Court (J.S. App. 46a) was filed on July 18, 1980. The jurisdictional statement was filed on August 19, 1980, and probable jurisdiction was noted on December 1, 1980 (J.A. 302). The jurisdiction of this Court rests on 28 U.S.C. 1252 and 1253.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 8, of the United States Constitution provides in pertinent part:

> The Congress shall have power * * *
>
> * * * * *
>
> To raise and support Armies * * *;
>
> To provide and maintain a Navy;
>
> To make Rules for the Government and Regulation of the land and naval Forces;
>
> * * * * *

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be * * * deprived of life, liberty, or property, without due process of law * * *.

Section 3 of the Military Selective Service Act, 50 U.S.C. App. 453, provides:

> Except as otherwise provided in this title [sections 451 to 471a of this Appendix], it shall be the duty of

every male citizen of the United States, and every other male person residing in the United States, who, on the day or days fixed for the first or any subsequent registration, is between the ages of eighteen and twenty-six, to present himself for and submit to registration at such time or times and place or places, and in such manner, as shall be determined by proclamation of the President and by rules and regulations prescribed hereunder. The provisions of this section shall not be applicable to any alien lawfully admitted to the United States as a nonimmigrant under section 101(a)(15) of the Immigration and Nationality Act, as amended (66 Stat. 163; 8 U.S.C. 101), for so long as he continues to maintain a lawful nonimmigrant status in the United States.

Section 4(a) of the Military Selective Service Act, 50 U.S.C. App. 454(a), provides in pertinent part:

> Except as otherwise provided in this title [sections 451 to 471a of this Appendix], every person required to register pursuant to section 3 of this title [section 453 of this Appendix] who is between the ages of eighteen years and six months and twenty-six years, at the time fixed for his registration, or who attains the age of eighteen years and six months after having been required to register pursuant to section 3 of this title [section 453 of this Appendix], or who is otherwise liable as provided in section 6(h) of this title [section 456(h) of this Appendix], shall be liable for training and service in the Armed Forces of the United States: *Provided*, That each registrant shall be immediately liable for classification and examination, and shall, as soon as practicable following his registration, be so classified and examined, both physically and mentally, in order to determine his availability for induction for training and service in the Armed Forces: *Provided further*, That, notwithstanding any other provision of law, any registrant who has failed or refused to report for induction shall continue to remain liable for induction and when available shall be immediately inducted. The President is authorized, from time to time, whether or not a state of war exists, to select and induct into the

Armed Forces of the United States for training and service in the manner provided in this title [said sections] (including but not limited to selection and induction by age group or age groups) such number of persons as may be required to provide and maintain the strength of the Armed Forces.

STATEMENT

1. This case involves the constitutionality of the statutory provisions governing draft registration and, consequently, under present law, the continuing authority of the President and Congress to raise armed forces through conscription.

Article I, Section 8, of the Constitution commits to Congress the responsibility to raise and support Armies, to provide and maintain a Navy, and to make rules for the government and regulation of the land and naval forces. In the Military Selective Service Act, Congress established procedures for maintaining "adequate armed strength * * * to insure the security of [the] Nation" (50 U.S.C. App. 451(b)) and for responding to war or other national emergency. Although the Act provides separately for registration and for conscription (and attendant classification), the processes are interlocked. Thus, Section 453 empowers the President to require by proclamation the registration of "every male citizen" and male resident alien "between the ages of eighteen and twenty-six," and Section 454(a) renders individuals "required to register * * * liable for training and service in the Armed Forces" upon the issuance of an induction notice. Section 454 further provides that every registrant shall be "immediately liable for classification and examination, and shall, as soon as practicable following his registration, be so classified and examined, both physically and mentally, in order to determine his availability for induction for training and service in the Armed Forces."[1]

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[1] With the advent of the All-Volunteer Force, the Act was amended generally to preclude conscription as of July 1, 1973. Pub. L. No. 92-

In early 1980, President Carter determined that it was necessary to reinstate the draft registration process.[2] That decision was, in part, a response to the invasion of Afghanistan, which marked "the first time since World War II [that] the Soviets moved in force into the territory of a neighboring nonaligned country." *Department of Defense Authorization for Appropriations for Fiscal Year 1981: Hearings on S. 2294 Before the Senate Comm. on Armed Services*, 96th Cong., 2d Sess. 1802 (1980) (joint statement of Dr. John P. White, Deputy Director, Office of Management and Budget, Dr. Bernard Rostker, Director. Selective Service System, and Richard Danzig, Principal Deputy Assistant Secretary of Defense (Manpower, Reserve Affairs and Logistics)). A year earlier, the President had opposed a reactivation of draft registration. But, as his delegates advised the Senate Armed Services Committee on April 2, 1980 (*id.* at 1805; emphasis in original):

> When the issue of peacetime registration was raised last September * * * the Secretary of Defense and the Director of OMB said that registration was not necessary * * * *at that time*. There was no crisis that had the potential for an imminent threat to the vital interests of the United States. The situation is different now, and so is our position on the issue of peacetime registration. The Administration's position before this crisis in Southwestern Asia was that *the President would not hesitate to use his present authority to require registration at any time he sees it as a necessary step to preserving or enhancing our national security interests*. He is convinced that time has come.

In addition to recommending the transfer of funds required for registration from the Department of Defense to

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129, Section 101(35), 85 Stat. 353, 50 U.S.C. App. 467(c). In 1975, President Ford discontinued Selective Service registration procedures. Presidential Proclamation No. 4360, 11 Weekly Comp. of Pres. Doc. 318 (Apr. 7, 1975). Reactivation of the conscription process thus would require amendment of the Act.

[2] In his State of the Union Address in January 1980, the President had recognized that registration was necessary to improve the Nation's defense posture (H.R. Doc. No. 96-257, 96th Cong., 2d Sess. 5 (1980)).

the Selective Service System, the President, largely on the basis of equitable considerations,[3] requested Congress to amend the Military Selective Service Act to permit the registration and conscription of women. *Presidential Recommendations for Selective Service Reform—A Report to Congress Prepared Pursuant to P. L. 96-107* (Feb. 11, 1980) (J.A. 29-79).[4] Congress agreed that reinstitution of registration was "vitally necessary" (S. Rep. No. 96-826, 96th Cong., 2d Sess. 157 (1980)),[5] and on June 12, 1980, allocated funds for that purpose through H.R.J. Res. 521.[6] But, after extensive hearings before committees of both

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[3]See, *e.g.*, *Hearings on S. 2294*, *supra*, at 1854-1856 (statement of Mr. Danzig); *Hearings on National Service Legislation Before the Subcomm. on Military Personnel of the House Comm. on Armed Services*, 96th Cong., 2d Sess. (Mar. 5, 1980) (unpublished) (joint statement of Robert B. Pirie, Jr., Assistant Secretary of Defense for Manpower, Reserve Affairs and Logistics, Dr. Bernard D. Rostker, Director, Selective Service System, and Larry L. Simms, Deputy Assistant Attorney General, Office of Legal Counsel) (J.A. 217-218).

[4]The President acknowledged (*Presidential Recommendations*, *supra* (J.A. 60)), however, that

> [t]he maximum number of women that can be used is subject to three constraints: (1) legislative prohibitions against the use of women in certain military positions, (2) the policy to reserve certain assignments, such as close combat roles, for men only and (3) the need to reserve a substantial number of noncombat positions for men in order to provide a pool of ready replacements for close combat positions.

[5]During previous Senate hearings on the reinstitution of registration procedures, serious concern also had been expressed about the Nation's inability to mobilize large military forces on short notice. *Reinstitution of Procedures for Registration Under the Military Selective Service Act: Hearing on S. 109 and S. 226 Before the Subcomm. on Manpower and Personnel of the Senate Comm. on Armed Services*, 96th Cong., 1st Sess. 1 (statement of Senator Nunn), 3-4 (statement of Senator Morgan) (1979). These hearings resulted in a Senate Armed Services Committee recommendation that male-only registration be reinstituted. S. Rep. No. 96-226, 96th Cong., 1st Sess. (1979).

[6]H.R.J. Res. 521 was signed into law on June 27, 1980.

the House of Representatives and the Senate, Congress declined to require the registration of women.[7]

As the Senate Armed Services Committee explained (S. Rep. No. 96-826, *supra*, at 157), "the starting point for

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[7]During the two years preceding that decision, both houses of Congress had given thorough consideration to the registration issue and, in particular, to the question of registering women. In 1979, both the House and Senate Armed Services Committees held extensive hearings on registration under the Military Selective Service Act. See *Reinstitution of Procedures for Registration Uunder the Military Selective Service Act: Hearing on S. 109 and S. 226 Before the Subcomm. on Manpower and Personnel of the Senate Comm. on Armed Services*, 96th Cong., 1st Sess. (1979); *Department of Defense Authorization for Appropriations for Fiscal Year 1980 and Legislation Concerning the Selective Service System: Hearings on H.R. 1872 [H.R. 4040] Before the House Comm. on Armed Services*, 96th Cong., 1st Sess. 939-1172 (1979). The Senate Armed Services Committee voted 12-5 to report S. 109, which would have required the reinstitution of registration procedures in January 1980, without a requirement for the registration of women. S. Rep. No. 96-226, 96th Cong., 1st Sess. 1, 8-9, 28 (1979). The bill was considered on the Senate floor on September 21, 1979. 125 Cong. Rec. S13129-S13130, S13132-S13133, S13148-S13183 (daily ed. Sept. 21, 1979). At the end of that day of debate, the bill was returned to the Senate calendar and no further action was taken. U.S. Senate Calendar Order No. 240, 96th Cong., 1st Sess.; 125 Cong. Rec. S13182 (daily ed. Sept. 21, 1979). Also in 1979, the House Armed Services Committee included in its Fiscal Year 1980 Defense Authorization Bill a provision that required the President to commence registration of men in January 1981 and to report to Congress on, among other issues, the question of the registration and induction of women. H.R. 4040, 96th Cong., 1st Sess. §§ 812-813 (1979). While the registration provision was deleted after debate on the House floor, 125 Cong. Rec. H7765-H7782 (daily ed. Sept. 12, 1979), the reporting provision remained in the final version of the bill, S. 428, 96th Cong., 1st Sess. (1979). See H.R. Rep. No. 96-546, 96th Cong., 1st Sess. 15, 50 (1979).

Both Houses of Congress held additional hearings on these issues in 1980. See *Department of Defense Authorization for Appropriations for Fiscal Year 1981: Hearings on 2294 Before the Senate Comm. on Armed Services*, 96th Cong., 2d Sess. (1980); *Hearings on National Service Legislation Before the Subcomm. on Military Personnel of the House Comm. on Armed Services*, 96th Cong., 2d Sess. (Mar. 5, 1980) (unpublished) (J.A. 213-243). On March 6, 1980, the House Subcommittee tabled H.R. 6569, which would have amended the Military

any discussion of the appropriateness of registering women for the draft is the question of the proper role of women in combat." Thus, while the Committee recognized (*ibid.*) the important contributions being made by women volunteers in noncombat roles and the dramatic increase in recent years in the number of women volunteering to fill those roles—a trend that it expected to continue—it focused on the facts that the purpose of registration is to "provide[ ] the means for early delivery of inductees in an emergency" and that the primary requirement of the induction system in such a situation would be for replacements in the combat arms and in close combat support roles for which "mobilization manpower is so severely short" in the volunteer forces. S. Rep. No. 96-826, *supra*, at 158. But current law and policy (not challenged by appellees herein) prohibit the assignment of women to these positions in which the greatest need exists. See discussion at pages 21-22 & 29-31, *infra*. In the Committee's view, those restrictions were "the most important reason for not

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Selective Service Act to permit the registration of women, by a vote of 8-1. Legislative Calendar, House Comm. on Armed Services, 96th Cong., 2d Sess. 53 (Sept. 30, 1980).

As discussed in the text *supra* (at 4-5), H.R.J. Res. 521 was the appropriations measure transferring funds for the Department of Defense to the Selective Service System to permit registration to begin in 1980. The House rejected the registration of women during consideration of H.R.J. Res. 521 on April 22, 1980. 126 Cong. Rec. H2728-H2729, H2747 (daily ed. Apr. 22, 1980). When the resolution was considered in the Senate, an amendment that, in effect, would have required the registration of women also was defeated after extensive debate. 126 Cong. Rec. S6527-S6549 (daily ed. June 10, 1980).

The Senate Armed Services Committee, meanwhile, had rejected, by a vote of 12-5, a pending proposal (S. 2440) to register young women under the Military Selective Service Act and had adopted Specific Findings on the issue of registering young women. Those findings were included in the Committee's report on the Fiscal Year 1981 Defense Authorization Bill, see S. Rep. No. 96-826, 96th Cong., 2d Sess. 160-161 (1980), and were specifically endorsed by the House-Senate Conferees on the Authorization Bill. See S. Conf. Rep. No. 96-895, 96th Cong., 2d Sess. 100 (1980). Both Houses of Congress subsequently adopted the findings by passing the Conference Report. 126 Cong. Rec. H7800, S11,646 (daily ed. Aug. 26, 1980).

including women in a registration system." S. Rep. No. 96-826, *supra*, at 157. The Senate Armed Services Committee's Specific Findings on the registration of women were expressly adopted in conference and endorsed by the full Congress (see note 7, *supra*).

On July 2, 1980, President Carter signed Proclamation No. 4771. The Proclamation required men born in 1960 and 1961 to register during the two-week period commencing July 21, 1980, required men born in 1962 to register during the week of January 5, 1981, and required men born on or after January 1, 1963, to register during the 30 days prior or subsequent to their eighteenth birthday (but in no event prior to January 5, 1981). Presidential Proclamation No. 4771, *reprinted in* 45 Fed. Reg. 45247 (1980).[8]

2. The present suit, challenging the Military Selective Service Act on a variety of grounds, was filed in the United States District Court for the Eastern District of Pennsylvania in 1971 by several male citizens who were subject to registration and induction.[9] In 1974, a three-

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[8]Paragraph 1-109 of Proclamation No. 4771 provides a deferral for those who cannot register at the assigned time "for some reason beyond their control such as hospitalization or incarceration" until 30 days after the termination of the condition that prevented their registration. With the exception of the registration of those subject to this deferral provision, registration of men born in 1960 and 1961 was completed during the two-week period commencing July 21, 1980, and registration of men born in 1962 was completed during the week of January 5, 1981. Registration of men born on or after January 1, 1963, is presently ongoing.

[9]The plaintiffs alleged that the Act amounted to a taking of property without due process, required involuntary servitude, violated their rights to free expression and assembly, was unlawfully implemented to advance an unconstitutional war, and impermissibly discriminated between males and females. February 19, 1980 memorandum at 1-2 (attachment G to appellant's stay application filed with this Court). An initial application to convene a three-judge court pursuant to 28 U.S.C. (1970 ed.) 2282 was denied in April 1972 and the suit was dismissed. *Rowland* v. *Tarr*, 341 F. Supp. 339 (E.D. Pa.). On appeal, the Third Circuit rejected as insubstantial all but the last of the plaintiffs' claims. The court of appeals remanded the case for a determination of whether the equal protection claim was sufficiently substantial to require the

judge district court was convened to consider only the question of whether the Act impermissibly discriminates on the basis of gender in limiting registration to males. After several years of dormancy,[10] the case was scheduled for trial in 1980. The district court certified appellees—who include at least one individual subject to the July 21, 1980 registration requirement—as representatives of a nationwide class of potential registrants and conscripts (J.S. App. 2a–4a), and a hearing was held on July 1, 1980.

In an opinion dated July 18, 1980, the district court essentially held (J.S. App. 14a) that the rational relationship test applied to the gender-based distinction in the promotion of naval officers in *Schlesinger* v. *Ballard*, 419 U.S. 498 (1975), no longer obtains, but rather that the male-only draft registration must be shown to be substantially related to an important governmental objective under the standard articulated in *Craig* v. *Boren*, 429 U.S. 190, 197 (1976). Applying the latter test, the district court refused to accord any deference to Congress' factual findings on the question of military need. Rather, it weighed and reassessed the evidence concerning mobilization flexibility provided by an all-male registration and draft *de novo*, and determined independently that Congress' judgment that national defense would be best served by a draft limited to males was wrong (J.S. App. 37a–43a). The court

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convening of a three-judge court and whether the plaintiffs had standing to assert that claim. *Rowland* v. *Tarr*, 480 F.2d 545 (1973). On remand, the district court answered both questions in the affirmative, and a three-judge court was convened.

[10]On July 1, 1974, the three-judge court, with Judge Rosenn dissenting, rejected the defendants' threshold challenges to the court's jurisdiction and to the justiciability of the case. *Rowland* v. *Tarr*, 378 F. Supp. 766 (E.D. Pa.). No further proceedings took place until June 1979, when the court proposed to dismiss the case pursuant to E.D. Pa. R. 23(a). At that time, additional discovery was taken and, on February 19, 1980, the court denied defendants' motion to dismiss on standing, mootness and ripeness grounds because it found that there were material questions of fact concerning those issues. February 19, 1980 memorandum (attachment G to appellant's stay application filed with this Court).

based this conclusion largely on its own interpretation of the evidence presented to Congress by the Executive Branch in favor of the registration of women, and on its own views as to how women conscripts might be deployed (*id.* at 41a–43a). The court declared the registration provisions unconstitutional and enjoined the government from requiring registration (J.S. App. 44a–45a).

On the same day, the district court denied a request for a stay pending appeal and the government applied for a stay from this Court. On July 19, 1980, Justice Brennan stayed the execution and enforcement of the district court's judgment pending the issuance of the judgment of this Court (J.S. App. 53a).

SUMMARY OF ARGUMENT

I.

In declaring the male-only registration requirement unconstitutional, the district court subjected the Military Selective Service Act to the intermediate equal protection standard of review articulated in *Craig* v. *Boren*, 429 U.S. 190 (1976). But the gender-based classification at issue here relates directly to concerns of national defense, and thus properly is considered under the more deferential "rational basis" standard applied under analogous circumstances in *Schlesinger* v. *Ballard*, 419 U.S. 498 (1975).

Historically, Congress properly has been afforded wide latitude in the exercise of its express powers under Article I, Section 8, of the Constitution to raise and regulate armies. Because the war powers are textually committed to Congress, they necessarily confer plenary authority to say "who shall serve * * * and in what way." *United States* v. *MacIntosh*, 283 U.S. 605, 622 (1931). In view of this specific delegation of authority to Congress, it would be inappropriate for a district court to adopt a standard of review that permitted it to substitute its judgment for that of Congress on matters involving the composition of the armed forces, even "in the unlikely event that [it] possessed [the] requisite technical competence to do so." *Gilligan* v. *Morgan*, 413 U.S. 1, 8 (1973).

The court below believed that the standard of review "should not vary from one factual context to another" (J.S. App. 19a). But that conclusion not only ignores *Schlesinger* v. *Ballard*, it also contradicts a consistent line of constitutional cases in which the Court has relaxed review standards in order to accommodate the judgments of the coordinate branches in matters involving the control and regulation of military affairs. See, *e.g.*, *Parker* v. *Levy*, 417 U.S. 733, 756 (1974) (relaxed review standard applies in determining whether military code is void for vagueness because "Congress is permitted to legislate both with greater breadth and with greater flexibility" in matters governing conduct of military affairs).

Application of the "rational relationship" standard of review is justified in this case by considerations in addition to the traditional deference due Congress in the exercise of its powers under Article I, Section 8, of the Constitution. First, the rational relationship test is additionally appropriate because the male-only registration provision is based not on sexual stereotypes, but on the ineligibility of women to be assigned to combat positions, which is unchallenged in this case. See *Schlesinger* v. *Ballard*, *supra*, 419 U.S. at 508. Thus, men and women alike who are unqualified for combat training and assignment are equally exempt from involuntary conscription. Cf. *Parham* v. *Hughes*, 441 U.S. 347 (1979) (plurality opinion); *Geduldig* v. *Aiello*, 417 U.S. 484 (1974).

Moreover, because the combat restrictions on women bear a very direct relationship to their ability to perform in and contribute to the military society, and because, in any event, those restrictions may be removed at some point, the grounds for the Court's subjecting purely gender-based distinctions to heightened scrutiny are not present here. Finally, as the extensive and vigorous congressional debate noted above demonstrates, the inclusion of women on the draft rolls is a matter requiring "sensitive policy choices" whose "resolution in a democracy" is best

left to the legislature. *Maher* v. *Roe*, 432 U.S. 464, 479 (1977).

II.

Even if the intermediate standard of *Craig* v. *Boren* applies, the male-only registration requirement passes constitutional muster because it is closely and substantially related to the important governmental interest of responding to a military emergency with maximum speed and efficiency.

A. It is well settled that the reasonableness of a statutory classification must be judged in light of the particular purpose served by that statute. *McLaughlin* v. *Florida*, 379 U.S. 184, 191 (1964). The primary purpose of the recent reactivation of the registration process was to establish a mechanism "for early delivery of inductees in an emergency." S. Rep. No. 96–826, 96th Cong., 2d Sess. 156 (1980). Registration, thus, is the first step in the conscription process, which, in turn, serves to provide the Nation with an efficient means of responding to a military emergency. See *Falbo* v. *United States*, 320 U.S. 549, 553 (1944). Because registration is an integral part of the process of conscription, the constitutionality of the male-only registration must depend, as the district court purported to recognize (J.S. App. 21a), on the constitutionality of a male-only conscription.

B. The evidence before Congress, as well as the additional evidence adduced in this suit, established that a male-only draft is closely tailored to sound emergency defense policy. The thrust of the evidence before Congress was that the predominant need would be "for combat replacements from the induction system." S. Rep. No. 96–826, *supra*, at 158. More specifically, the principal demand for conscripts would be to replace casualties in the infantry, armor, combat engineering, field artillery and related specialties. *Id.* at 157–158. But these areas of need for the most part are closed to women under current law and policy. While all conscripts would not be assigned to combat positions, and while large numbers of categories of mili-

tary occupational specialties are open to women, the evidence before Congress demonstrated that in recent years more than sufficient numbers of women have been volunteering to staff those noncombat positions for which they are eligible. As then Army Chief of Staff General Bernard Rogers explained, "[t]here is an overstrength * * * in those types of functions [in which] our women would be found." *Hearings on S. 2294*, *supra*, at 1215.

Other evidence showed that the substitution of female for male conscripts could affirmatively impair defense efforts. Military flexibility requires the ability to rotate combat troops to noncombat assignments following periods of conflict and to transfer noncombat personnel into the war zone. *Reinstitution of Procedures for Registration Under the Military Selective Service Act: Hearing on S. 109 and S. 226 Before the Subcomm. on Manpower and Personnel of the Senate Comm. on Armed Services*, 96th Cong., 1st Sess. 16 (1979) (testimony of General Rogers). The substitution of women for men in those noncombat positions would deny the armed forces that flexibility. Similarly, expert military testimony demonstrated that the timeliness of our mobilization and deployment rates would be critical to the successful outcome of our present day military strategies. Congress thus rationally determined that the Nation's ability to respond with maximum speed and efficiency would be compromised by having to pick and choose from among male and female inductees depending upon their eligibility for the assignments at hand because of combat restrictions. Congress was equally concerned that a military liability would be incurred by having to devote limited training facilities to conscripts ultimately ineligible for combat, close combat support, or combat rotation positions.

The district court believed that including women in the draft pool could only enhance the Armed Services' flexibility. But that conclusion is attributable to the fact that the court considered registration in isolation and, notwithstanding its statement to the contrary, failed to regard it as the first step in the conscription process. Thus,

although the exclusion of a large number of persons from an abstract registration roll might appear to detract from flexibility, the exclusion of combat-barred personnel from a finite pool of conscripts has the opposite effect. As one expert in military affairs opined, "the price you would pay" for this kind of substitution is "the decreased effectiveness of the overall force." Deposition testimony of now Army Chief of Staff General Edward C. Meyer (J.A. 264).

Ultimately, Congress concluded that substituting female for male conscripts not only would fail to enhance military preparedness, but, in fact, would detract from it by reducing the flexibility that the military requires to meet national emergencies. This decision was closely tailored to the important purpose of the Military Selective Service Act and thus plainly survives intermediate scrutiny. In reaching a contrary conclusion, the district court not only erred in reweighing *de novo* evidence that was for Congress to judge, but it essentially held that Congress may not provide an exclusionary registration system so long as it may be physically capable of structuring a dual combat/noncombat registration and induction scheme. This approach demands far too much of the "important governmental interest test" and, consequently, permits the judiciary to intrude into military matters that the Constitution expressly has entrusted to Congress.

ARGUMENT

I. THE DISTRICT COURT ERRED IN ANALYZING THE GENDER-BASED CLASSIFICATION OF THE MILITARY SELECTIVE SERVICE ACT UNDER THE "SUBSTANTIAL RELATION TO AN IMPORTANT GOVERNMENTAL INTEREST" TEST RATHER THAN UNDER THE MORE DEFERENTIAL "RATIONAL RELATIONSHIP" TEST

A. The Rational Relationship Test Is Applicable To Gender-Based Classifications Arising In The Military Context

The Due Process Clause of the Fifth Amendment, like the Equal Protection Clause of the Fourteenth, prohibits invidious discrimination between similarly situated groups. *Schneider* v. *Rusk*, 377 U.S. 163, 168 (1964); *Bolling* v. *Sharpe*, 347 U.S. 497, 499 (1954).[11] Ordinarily, a legislative classification will be upheld in the face of an equal protection claim if it bears a rational relationship to a legitimate state purpose. *United States Railroad Retirement Board* v. *Fritz*, No. 79–870 (Dec. 9, 1980), slip op. 2 (Justice Brennan, dissenting). A statutory distinction that implicates fundamental rights or suspect classifications such as race or religion, on the other hand, will be stricken in the absence of a showing of a compelling governmental interest that cannot be achieved by any less drastic means. *Dunn* v. *Blumstein*, 405 U.S. 330, 342–343 (1972). Further, this Court has articulated an intermediate level of scrutiny applicable to gender-based discrimination: the classification "must serve important governmental objectives and * * * must be substantially related to the achievement of those objectives." *Wengler* v. *Druggists Mutual Ins. Co.*, 446 U.S. 142, 150 (1980); *Califano* v. *Westcott*, 443 U.S. 76, 85 (1979); *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U.S. 256, 273 (1979); *Caban* v. *Mohammed*, 441 U.S. 380, 388 (1979); *Orr* v. *Orr*, 440 U.S. 268, 279 (1979); *Califano* v. *Webster*, 430 U.S. 313, 316–317 (1977); *Califano* v. *Goldfarb*, 430 U.S. 199, 201–211 (1977); *Craig* v. *Boren*, 429 U.S. 190, 197 (1976).

The present case, however, involves more than the equal protection component of the Fifth Amendment. It implicates as well Congress' powers under Article I, Section 8, of the Constitution, in the exercise of which the courts have afforded Congress wide latitude. As we show below, the broad deference due Congress when it legislates in the military context and the demands of equal pro-

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[11] "[W]hile the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is 'so unjustifiable as to be violative of due process.'" *Schneider* v. *Rusk*, *supra*, 377 U.S. at 168, quoting *Bolling* v. *Sharpe*, *supra*, 347 U.S. at 499.

tection can best be accommodated in this case by the application of the rational relationship test. Thus, while the Act's gender restriction withstands even the *Craig* v. *Boren* intermediate level of scrutiny (see pages 26–38, *infra*), the district court erred initially in applying that test, rather than the rational relationship test, which this Court previously has applied to statutory classifications tailored to the needs of national defense.

Much like the present case, *Schlesinger* v. *Ballard*, 419 U.S. 498 (1975), involved a gender-based classification based on national defense considerations. Under the provisions at issue in that case, commissioned male naval officers were subject to mandatory discharge for failing twice to be promoted within approximately 10 years of service, while female officers were afforded 13 years to obtain equivalent promotions. Although the Court previously had subjected gender-based discrimination to heightened scrutiny in, *e.g.*, *Reed* v. *Reed*, 404 U.S. 71 (1971), and *Frontiero* v. *Richardson*, 411 U.S. 677 (1973) (plurality opinion),[12] *Schlesinger* v. *Ballard* upheld the statute on the ground that there was a *rational basis* upon which Congress *may* have proceeded in applying disparate standards to male and female officers in view of military needs. 419 U.S. at 508.[13] In so holding, the Court relied on Congress' "broad constitutional power" to raise and regulate armies and navies (U.S. Const., art. I, § 8) and emphasized that "[t]he responsibility for determining how best our Armed Forces shall attend to" fighting and de-

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[12] See *Craig* v. *Boren*, *supra*, 429 U.S. at 197–199 (explaining that intermediate scrutiny had been applied, although not fully articulated, in previous cases).

[13] Justices Brennan, Douglas and Marshall, dissenting, criticized this analysis on the ground that "a legislative classification that is premised solely upon gender must be subjected to close judicial scrutiny," and because the majority had "conjure[d] up a legislative purpose which *may* have underlain the gender-based distinction here attacked" (419 U.S. at 511; emphasis by the Court). Compare *Califano* v. *Goldfarb*, 430 U.S. 199, 212–213 (1977) (only rationale actually relied on by Congress can support gender-based discrimination under middle-level scrutiny).

veloping readiness for fighting wars rests with Congress, and not with the courts. 419 U.S. at 510.[14]

Schlesinger v. *Ballard* exemplifies this Court's consistent recognition of the wide latitude that is due Congress in the exercise of its responsibility to raise and regulate military forces in defense of the Nation. See, *e.g.*, *Schlesinger* v. *Councilman*, 420 U.S. 738, 757–758 (1975); *United States ex rel. Toth* v. *Quarles*, 350 U.S. 11, 17 (1955); *Orloff* v. *Willoughby*, 345 U.S. 83, 93–94 (1953). Judicial deference to the judgments of the coordinate branches is particularly warranted with respect to "[t]he complex, subtle, and professional decisions as to the composition,

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[14] Although the gender-based discrimination in *Frontiero* v. *Richardson* also arose out of a classification drawn by a military statute, that statutory classification was not related to military preparedness or to any other purpose so central to the military mission as to invoke the traditional deference that courts have accorded to military affairs. Rather, *Frontiero* involved the constitutionality of a scheme whereby a female member of the uniformed services could claim her husband as a "dependent" for the purposes of obtaining increased quarters allowances and medical and dental benefits only if he in fact was dependent upon her for over one-half of his support, whereas a serviceman could claim his wife as a "dependent" regardless of whether she in fact was dependent upon him for any part of her support. 411 U.S. at 678. *Frontiero*, therefore, is more like the cases in which this Court has struck down disparate awards of social welfare benefits to male and female wage earners. See *Wengler* v. *Druggists Mutual Ins. Co.*, *supra*; *Califano* v. *Westcott*, *supra*; *Califano* v. *Goldfarb*, *supra*; *Weinberger* v. *Wiesenfeld*, 420 U.S. 636 (1975). Gender-based distinctions in the context of draft registration, on the other hand, are based on considerations central to the defense mission of the armed services and, therefore, are more like the classification involving the promotion and discharge of naval officers upheld in *Schlesinger* v. *Ballard*, *supra*.

We further note that the classification at issue in *Frontiero* applied not only to the armed forces, but to all members of the uniformed services, which included the Army, Navy, Air Force, Marine Corps, Coast Guard, Environmental Science Services Administration and the Public Health Service. 411 U.S. at 768 n.1. The breadth of the classification demonstrates that it was not tailored to a central military mission and, therefore, that the traditional deference accorded to the military would not have been appropriately applied in that case.

training, equipping, and control of a military force." *Gilligan* v. *Morgan*, 413 U.S. 1, 10 (1973). As the Court instructed in *United States* v. *MacIntosh*, 283 U.S. 605, 622 (1931), the Constitution empowers Congress to raise armies "[i]n express terms"; such authority "necessarily connotes the [plenary] power to say who shall serve in them and in what way." Thus, it would be inappropriate for a court to substitute its judgment for that of Congress in this area even "in the unlikely event that [it] possessed [the] requisite technical competence to do so." *Gilligan* v. *Morgan*, *supra*, 413 U.S. at 8.[15]

The district court rejected the application of a deferential standard of review as only "superficially appealing" (J.S. App. 30a), concluding (J.S. App. 19a) that "the test to apply in determining if gender-based discrimination is constitutional should not vary from one factual context to another."[16] That conclusion, however, ignores not only *Schlesinger* v. *Ballard*, a decision of continuing vitality, but also the wholly consistent approach that this Court has taken in other constitutional cases arising in the military context.

For example, in *Parker* v. *Levy*, 417 U.S. 733, 756 (1974), the Court held that the review standards which normally determine whether a statute is void for vagueness or overbreadth must be relaxed when the statute governs the "military society." In such circumstances,

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[15] See also *Bertelsen* v. *Cooney*, 213 F.2d 275, 277 (5th Cir.), cert. denied, 348 U.S. 856 (1954) ("It is not for the judiciary to review the legislative branch on the question of what military strength is necessary for the safety of the Nation, nor how the forces shall be raised, nor of what elements they shall be composed"); *Vance* v. *Bradley*, 440 U.S. 93, 97 (1979).

[16] Having so concluded, the court nonetheless went on to explain (J.S. App. 20a) that "[w]e are not here concerned with military operations or day to day conduct of the military into which we have no desire to intrude." As the district court itself recognized, however (Pet. App. 21a), registration cannot be considered independently of induction and, as we show at pages 31–36, *infra*, the induction of women would have a substantial (negative) impact upon the day to day conduct of the military.

"Congress is permitted to legislate both with greater breadth and with greater flexibility* * *." *Ibid.* Accordingly, the Court held (*id.* at 756–757) that the proper standard of review to be applied to a vagueness challenge to provisions of the Uniform Code of Military Justice is the standard applicable to criminal statutes regulating economic affairs. Similarly, in *Greer* v. *Spock*, 424 U.S 828 (1976), the Court, deferring to the military (see *id.* at 837–838), upheld the government's ban of political speech by civilians on military bases—a content-based restriction of a fundamental First Amendment right that would have been flatly impermissible in a nonmilitary context (see Justice Powell's concurring opinion). And, in *Brown* v. *Glines*, 444 U.S. 348 (1980), the Court upheld Air Force regulations that imposed a prior restraint on the First Amendment right to petition, without demanding of the government the "compelling interest" that would have been required to support a prior restraint in a civilian context. Finally, because of the paramount importance of national defense and the inherent latitude that attaches to the exercise of the war powers, the Court has approved Congress' decision to deny conscientious objector status to those opposed to participation in a particular war, rather than all wars, even if conscription of such an individual would violate a *bona fide* religious conviction. *Gillette* v. *United States*, 401 U.S. 437 (1971).[17]

The same considerations that warranted a deferential standard of review in the foregoing cases similarly require the application of the rational relationship test in the present case. Even a cursory review of the evidence demon-

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[17] Cf. *Snepp* v. *United States*, 444 U.S. 507, 509 n.3 (1980) (approving, in the interest of national security, the CIA's prior restraint on publication "that in other contexts might be protected by the First Amendment"). See also *Burns* v. *Wilson*, 346 U.S. 137 (1953) (although constitutional rights are not extinguished in military setting, the fact that control of the military is entrusted to Congress, not the civil courts, narrows the scope of habeas corpus inquiry); *United States* v. *MacIntosh*, *supra*, 283 U.S. at 622 (breadth of war powers permits Congress to take a wide variety of actions that would be constitutionally prohibited in non-defense contexts).

strates that national defense considerations and questions of military force composition and flexibility were at the heart of Congress' determination of whom to include in the draft registration rolls. Thus, by employing the intermediate standard of review adopted in *Craig* v. *Boren* and refusing to defer to Congress' judgment on the composition of the draft registration, the district court placed itself in the inevitable position of directing how the armed forces shall attend to the business of national defense. While disavowing the intention to do so (J.S. App. 20a), the district court itself sifted and reevaluated the evidence that had been before Congress on the issue of an all-male registration and draft, and concluded *de novo* that it was "unconvincing" (J.S. App. 23a). Relying on selective studies, the district court expressed its own view on advantages that might accrue from the height and weight differences between men and women, independently assessed the time-savings and deployment options that might be realized by using noncombat eligible women rather than combat-trained men, and even went so far as to discount Congress' conclusion that it is critical for all conscripts to be eligible for deployment into conventional combat and combat support roles on its unsupported (and contradicted; see page 30, *infra*) assumption that such use of troops "is probably less likely in this time of high technology warfare" (J.S. App. 28a n.18, 32a–35a & nn.23–26). Plainly, the district court's application of heightened scrutiny carried it into an area far beyond its "technical competence." *Gilligan* v. *Morgan*, *supra*, 413 U.S. at 8.[18]

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[18] As this Court stated in *Vance* v. *Bradley*, 440 U.S 93, 111 (1979), quoting *Firemen* v. *Chicago, R.I. & P. R.R.*, 393 U.S. 129, 139 (1968), it was not for the district court "'to resolve conflicts in the evidence against the legislature's conclusion or even to reject the legislative judgment on the basis that [it is] without convincing statistics in the record to support it * * *.'" This admonition applies with even greater force in this case where, as we show below, Congress' conclusions were based on a sound and substantial body of evidence.

The district court implicitly justified its independent factual conclusions on the ground that the Executive Branch itself had sought to

B. Heightened Scrutiny Is Also Inappropriate Here Because The Challenged Classification Is Based On Women's Uchallenged Ineligibility To Be Utilized In Combat, And Not On Gender Alone

Considerations in addition to the deference traditionally accorded Congress in its exercise of the war powers warrant application of a deferential review standard here.

1. *Schlesinger* v. *Ballard*, *supra*, also suggests that only the rational relationship test is applicable where the challenged classification is based on something more than the sex characteristic. In *Ballard*, the Court emphasized that the promotion period differential for male and female officers was not based on "archaic and overbroad" generalizations about women, but rather on the fact that female officers had less opportunity for promotion than did their male counterparts as a result of combat restrictions applicable only to women, which the appellees in that case did not challenge. 419 U.S. at 508. Here, Congress similarly based its decision to exclude women from the draft pool not on archaic or stereotypic notions about the role of women, but on the same statutory inability of women to be assigned to combat positions, also unchallenged by appellees herein.

At the present time, female officers and enlisted members of the Regular Navy and the Regular Marine Corps "may not be assigned to duty on vessels or in aircraft that are engaged in combat missions nor may they be assigned to other than temporary duty on vessels of the Navy except hospital ships, transports, and vessels of a similar classification not expected to be assigned combat missions." 10 U.S.C. (Supp. II) 6015. Similarly, 10 U.S.C. 8549 prohibits the assignment of female members of the Air Force (except for, *e.g.*, physicians, dentists, and

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expand registration to include women and had presented evidence to Congress in support of that end. In the final analysis, however, the Constitution commits that decision, and its timing, to Congress. See U.S. Const., art. I, § 8.

nurses) "to duty in aircraft engaged in combat missions." While there are no statutory restrictions on the assignment of women in the Army, the Secretary of the Army determines where women may serve and, in conjunction with the Chief of Staff, develops policies and programs to employ Army women effectively. Current Army policy excludes female officers and enlistees from specialties and units that relate to close combat, *i.e.*, infantry, armor, cannon field artillery, combat engineer and low altitude air defense units of battalion/squadron or smaller size (J.A. 58).[19] In addition to the statutory prohibition against women serving on vessels engaged in combat, the Marine Corps, like the Army, as a matter of policy does not assign women to units whose primary mission is combat or to military occupations that are primarily associated with combat units (*ibid.*).[20]

Appellees expressly do not challenge the validity of the legal and policy restrictions on employing women in combat, close combat support and combat rotation roles,[21] and the district court thus correctly presumed those restrictions to be valid (J.S. App. 20a, 22a). Furthermore, as we show below (at 29–36), it was precisely because of these

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[19] Army women are assigned, however, to combat support and combat service support units in divisions, including maintenance battalions, signal battalions, brigade level headquarters and certain artillery units (*ibid.*).

[20] The Senate Armed Services Committee expressly "reaffirm[ed]" "[c]urrent law and policy [that] exclude women from being assigned to combat in our military forces * * *." S. Rep. No. 96-826, *supra*, at 157.

[21] See, *e.g.*, statement of Donald Weinberg, counsel for appellees (J.A. 256):

> The question of whether a job should be open to females in time of war, and in time of threat, I am leaving firmly in the discretion of the Army. This is not what the suit is about, and it's a misapprehension that I think has been fostered in the papers of the defendants, and it totally misapprehends what the suit is about.
>
> We do not seek to say that you have to put women in combat, or you have to put them in close support, or you have to put them in a helicopter or anywhere else.

combat restrictions on women that Congress determined *not* to call for their registration and induction. Thus this case, like *Ballard*, is more properly viewed as involving a distinction between combat eligible and combat ineligible persons (see note 22, *infra*), as to which nothing stricter than the rational relationship test need be applied.

Similarly, in *Geduldig* v. *Aiello*, 417 U.S. 484, 496-497 & n.20 (1974), this Court held that because a state disability insurance program's exclusion from coverage of disabilities related to pregnancy was based not on gender *per se*, but rather on the additional condition of pregnancy, it was subject to review under only the rational relationship standard. Analogously, in the present case, women—like the substantial percentage of men who are ineligible for combat assignment and are released from draft obligations at the classification stage—are excluded from the draft pool on the basis of the statutory disability imposed on the female sex. Cf. *Parham* v. *Hughes*, *supra*, 441 U.S. at 355-357.[22]

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[22] Appellees have objected (Motion to Affirm 19) that "[a]ll young men, fit or unfit, but no women however fit to serve, are compelled to register for potential conscription into the Armed Forces." But, of course, those men who are ineligible for combat assignment—including not only the "halt" and the "blind," as appellees put it (*id.* at 46), but the flatfooted as well—ultimately are stricken from the induction rolls through the classification process. All persons ineligible for combat—male and female—are thus equally excused from "conscription into the Armed Forces," *id.* at 19 (with the exception that conscientious objectors who are not opposed to participation in noncombat service will be inducted for assignment to such service; 50 U.S.C. App. 456(j)). This has always been the case historically, even during periods of declared war, when the stringency of physical induction standards are relaxed pursuant to 50 U.S.C. App. 454(a). Ideally, one would excuse all those unfit for combat from registration as well. But that is not practical. Classification is in essence a statement of availability for immediate induction. It has thus been deferred until after the issuance of induction notices because, at least in some cases, the physical and mental conditions of registrants are subject to change, and the evidence demonstrated that it is most efficient to presume all males combat-capable until classification. See *Hearings on S. 2294*, *supra*, at 1827 (testimony of Dr. Rostker); *Presidential Recommendations*, *supra* (J.A. 51-54). On the other hand, since every woman is prohibited by law and policy

2. Moreover, because the exclusion of women from the registration requirement is due to their ineligibility to fill combat positions, the usual reasons for applying heightened scrutiny to gender-based classifications do not apply here. In articulating a standard that subjects legislative classifications based purely on gender to heightened scrutiny, this Court was influenced by the facts that "sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth," and that "what differentiates sex from such nonsuspect statuses as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society." *Frontiero* v. *Richardson*, *supra*, 411 U.S. at 686 (footnote omitted).

In contrast, in light of the unchallenged combat restrictions that affect only women, the sex characteristic bears a very definite relationship to a female's ability to perform and contribute in the military context. Furthermore, the combat restrictions, which account for the challenged classification, are hardly immutable. If and when they are removed, an amendment to the registration provisions of the Act can follow. Intervention on constitutional grounds thus is not required.[23]

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from combat assignment, it would have made no sense for Congress to require the registration of women in the first place in view of its goal of conscripting only persons capable of combat assignment.

[23]There is more than an abstract possibility that the combat restrictions on women could be lifted at some future date. The Department of Defense has sought the full repeal of legislatively imposed restrictions on the assignment of women to combat positions in the Navy (10 U.S.C. (Supp. II) 6015 and the Air Force (10 U.S.C. 8549). See *America's Volunteers—A Report on the All-Volunteer Armed Forces* (Dec. 31, 1978) (J.A. 88). Indeed, Section 6015 recently was amended to permit Navy women to be assigned to "hospital ships, transports, and vessels of a similar classification not expected to be assigned to combat missions." Pub. L. No. 95-485, Title VIII, Section 808, 92 Stat. 1623. In the Army, where combat prohibitions are maintained as a matter of departmental policy, the possibility of expanding the availability to women of combat-related occupational specialties has been

3. Finally, the composition of the draft pool has been the subject of a vigorous congressional debate. See note 7, *supra*. The compulsory inclusion of women in a draft registration also has been a focal point of the pending Equal Rights Amendment. See, *e.g.*, S. Rep. No. 92-689, 92d Cong., 2d Sess. 13-14 (1972); *Equal Rights for Men and Women 1971: Hearings on H.J. Res. 35, 208 and Related Bills and H.R. 916 and Related Bills Before Subcomm. No. 4 of the House Comm. on the Judiciary*, 92d Cong., 1st Sess. (1971). "[W]hen an issue involves policy choices as sensitive as [these] * * *, the appropriate forum for their resolution in a democracy is the legislature." *Maher* v. *Roe*, 432 U.S. 464, 479 (1977) (public funding of nontherapeutic abortions). For this reason as well, the appropriate accommodation of the demands of the military with the requirements of equal protection is the application of the rational relation test.

4. As we show below, the all-male registration requirement is substantially related to the important governmental interest in effectively and efficiently meeting a national military emergency. Plainly, therefore, it survives scrutiny under the rational relation test. Indeed, the

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the subject of testing and study. See *America's Volunteers*, *supra* (J.A. 87); Office of the Secretary of Defense (Manpower, Reserve Affairs, and Logistics), *Use of Women in the Military* (2d ed. 1978) (J.A. 100). There is additional evidence to be obtained and digested, however, and the Army is moving cautiously because of the significant implications for national security. *Use of Women in the Military*, *supra* (J.A. 106, 108) ("[t]here are still many unanswered questions * * *" and we must "err on the side of national security").

As this Court noted in *Schlesinger* v. *Ballard*, *supra*, 419 U.S. at 510 n.13, that Congress itself may eliminate the restrictions that underlie the challenged classification is further justification for the courts to defer to the legislature. At the time *Ballard* was decided, the Department of Defense had submitted a bill to Congress that would have eliminated the differential treatment of women that was challenged in that case. In upholding the classification under a rational basis approach, the Court stated: "These developments no more than reinforce the view that it is for Congress, and not for the courts, to decide when the [military] policy goals sought to be served by [the statute] are no longer necessary." *Ibid.*

courts of appeals that have been faced with challenges to the Military Selective Service Act on gender discrimination grounds uniformly have applied the rational relation test and upheld the exclusion of women from registration and induction as rationally related to the purposes of the Act. See *United States* v. *Reiser*, 532 F.2d 673 (9th Cir.), cert. denied, 429 U.S. 838 (1976); *United States* v. *Baechler*, 509 F.2d 13, 14-15 (4th Cir. 1974), cert. denied, 421 U.S. 993 (1975); *United States* v. *Camara*, 451 F.2d 1122, 1126 (1st Cir. 1971), cert. denied, 405 U.S. 1074 (1972); *United States* v. *Fallon*, 407 F.2d 621, 623 (7th Cir.), cert. denied, 395 U.S. 908 (1969).

II. THE GENDER-BASED CLASSIFICATION OF THE MILITARY SELECTIVE SERVICE ACT IS SUBSTANTIALLY RELATED TO AN IMPORTANT GOVERNMENTAL INTEREST

A. The Constitutionality Of An All-Male Registration Depends On The Constitutionality Of An All-Male Draft

It is well settled that the reasonableness of a statutory classification must be judged in light of the purpose served by the statute. *McLaughlin* v. *Florida*, 379 U.S. 184, 191 (1964). As discussed at page 3, *supra*, the registration and conscription provisions of the Military Selective Service Act are interlocked. There can be no conscription without registration. And, as the district court correctly pointed out (J.S. App. 21a),

> [r]egistration of a class of citizens with absolutely no purpose would be unconstitutional under any standard of review. The imposition of the burden to register upon any class of citizens must be justified. The justification here should relate to the governmental need to raise military forces by conscription. We can consider the registration only in light of its justification.

Specifically, the purpose of Congress' reinstitution of registration procedures at the present time was to "provide[ ] the means for early delivery of inductees in an

emergency." S. Rep. No. 96-826, 96th Cong., 2d Sess. 156 (1980). The constitutionality of the all-male registration thus must be determined, under *Craig* v. *Boren*, by reference to whether it serves substantially to satisfy the Nation's emergency conscription needs. See *Falbo* v. *United States*, 320 U.S. 549, 553 (1944) (dominant objective of the Act is to "raise an army speedily and efficiently").[24]

But while the district court initially recognized that the constitutionality of an all-male registration is dependent on the constitutionality of an all-male draft, it soon lost sight of its own conclusion. Thus, in rejecting the factual basis of Congress' perception of military needs, the district court accorded great weight to the testimony of the then members of the Joint Chiefs of Staff in favor of registering women. J.S. App. 39a & n.30, 37a. However, while the Joint Chiefs had no objection to *registering* women (*Hearing on S. 109 and S. 226*, *supra*, at 10-11), they uniformly were of the view that there was no military need to *draft* women (see pages 31-32, *infra*). It is the

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[24] In advocating repeal of the Act's gender restriction, representatives of the Executive Branch had urged Congress to require all women to register and to leave the decision of how many women—if any—actually would be conscripted to be made at some later date, on the basis of the military needs at that point. See, *e.g.*, *Hearings on S. 2294*, *supra*, at 1674 (statement of Mr. Simms). Congress, however, in a rational exercise of its statutory powers, insisted on linking registration procedures to what the evidence showed would best, and most efficiently, satisfy induction needs. See *Hearings on S. 2294*, *supra*, at 1670 (comments of Principal Deputy Assistant Secretary of Defense Danzig) ("The purpose of registration is to equip us with information so that if we had a national mobilization, we could move more quickly to achieve our wartime personnel requirements with greater effectiveness"), 1197 (comments of Senator Warner) ("I equate registration with the draft * * *"), 1195 (comments of Senator Jepsen) ("If women are not going to be called into combat and assigned combat duty, then it seems logical to me that they not be drafted. So why register them?"). See also deposition testimony of Dr. Rostker (J.A. 246) (the purpose of the "revitalization" of the registration process was "to provide a firm basis on which the Selective Service could respond in a national emergency to the manpower requirements forwarded to [it] by the Secretary of Defense or by the Assistant Secretary of Defense for Manpower").

latter testimony that is meaningful when registration is properly regarded as a first step in the conscription process. A review of this and other evidence presented to Congress, the most significant of which was that the drafting of women, in fact, would be to the *detriment* of military preparedness, demonstrates that Congress' decision to limit the draft pool to men is substantially related to the important governmental interest in meeting effectively the Nation's emergency military needs.[25]

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[25] In evaluating the basis for drafting only men, the district court correctly considered the extensive legislative history underlying Congress' recent decision against amending the draft provisions of the Military Selective Service Act to include women (see note 7, *supra*). In their Motion to Affirm (at 4, 36–37), appellees contended that the constitutionality of the male-only registration must stand or fall solely on the basis of the reasons articulated by Congress when it enacted the Military Selective Service Act in its "modern form" in 1948; and that the reasons and conclusions expressed in the Report of the Senate Armed Services Committee in 1980, S. Rep. No. 96–826, 96th Cong., 2d Sess. 154–164 (1980), must be dismissed as afterthought which played no actual part in the enactment of the exclusionary registration provisions. First, as shown at pages 14–26, *supra*, the classification at issue is properly judged under the "rational relationship" test, and thus may be sustained on the basis of any set of factors on which Congress may have relied. See *United States Railroad Retirement Board* v. *Fritz*, No. 79–870 (Dec. 9, 1980), slip op. 11; *Dandridge* v. *Williams*, 397 U.S. 471, 485 (1970); *Allied Stores of Ohio, Inc.* v. *Bowers*, 358 U.S. 522, 528 (1959). In any event, the findings and conclusions articulated by the Armed Services Committee were not offered merely as a rationalization for what Congress did in 1948. Rather, they were part of a comprehensive reexamination of the registration and draft issues in view of current military needs, and followed lengthy hearings on the President's proposal to amend the Act and expand draft registration to include women. These findings culminated in the current defense authorization act, Pub. L. No. 96–342, 94 Stat. 1077, which, in conjunction with H.R.J. Res. 521 (limiting the transfer of funds for registration to the amount necessary to register males), rejected the President's proposal to register women. See S. Conf. Rep. No. 96–895, 96th Cong., 2d Sess. 100 (1980). This legislation thus essentially constitutes a reconsideration and reenactment of the gender-restricted draft registration, and it is therefore appropriate—indeed, necessary—that its history be taken into account in evaluating the basis for that restriction.

B. Given The Current Prohibitions On Assigning Women To Combat, The Exclusion Of Women From The Draft Pool Is Substantially Related To Meeting Effectively The Nation's Emergency Military Needs

1. *The evidence before Congress showed that in a national military emergency, the primary demand on the induction system would be for combat troops, positions for which women, concededly, are ineligible*

The evidence presented to Congress established that if an emergency draft were required, the primary demand on "the induction system" would be for "combat replacements" to alleviate shortfalls in the volunteer forces. S. Rep. No. 96-826, *supra*, at 158. See *id.* at 154-155, 160; S. Rep. No. 96-226, *supra*, at 2-3, 6; *Hearing on S. 109 and S. 226*, *supra*, at 24, 54 (statements of then Army Chief of Staff General Bernard Rogers). Expert military testimony during the March 1980 hearings before the Senate Armed Services Committee typically was to the effect that "our requirement for registration is based on large numbers of men to replace casualties." *Hearings on S. 2294*, *supra*, at 1528-1529 (testimony of Marine Corps Lieutenant General Edward Bronars); accord, *id.* at 1395 (testimony of Principal Deputy Assistant Secretary of the Army William D. Clark) ("your immediate and very evident demand is going to be first to fill up the kinds of units that have to be deployed early, with an added demand for the replacement of casualties").

While the district court relied, *inter alia*, on its own assumption (J.S. App. 32a n.23) that only a small percentage of conscripts would be required for combat roles, the Committee heard evidence that, in the event of mobilization, approximately two-thirds of the demand on the induction system would be for combat skills. *Hearings on S. 2294*, *supra*, at 1390 (testimony of Lieutenant General Robert G. Yerks, Army Deputy Chief of Staff for Personnel). See deposition testimony of Major General R. Dean Tice, Deputy Assistant Secretary of Defense (J.A. 282)

(the "bulk of your requirements in war time certainly go into combat and combat support skills. You know as a function of expansion, the ratio of the logistical or administrative support certainly doesn't increase at the same rate as combatants do in war time").

Indeed, high level military personnel who testified in this case were of the view (contrary to the unsupported assumption of the district court; see J.S. App. 32a n.23) that developing methods of warfare employed by the United States and its allies would require *more* combat intensive forces than those that had been required during past military conflicts. See, *e.g.*, *Hearings on S. 2294*, *supra*, at 1390 (deposition testimony of Lieutenant General Robert G. Yerks, Army Deputy Chief of Staff for Personnel); testimony of Army Chief of Staff General Edward C. Meyer (J.A. 262-263) (as shown by the Yom Kippur War, future wars are likely to result in increased losses of manpower and material); deposition testimony of Army Deputy Chief of Staff Lieutenant General Harold G. Moore (J.A. 252) (Army is attempting to "increase the teeth and reduce the tail").

But it is those combat positions, and, in particular, those combat positions in which the most critical shortages are expected to arise, that are closed to women. As explained in S. Rep. No. 96-826, *supra*, at 157-158:

> Only 6 percent of the enlisted skills in the Army are closed to women as a result of the exclusion of women from combat. But these include infantry specialists, armor specialists, combat engineers and positions in field artillery and air defense. It is in these skills, and more specifically in the very large number of positions needed to be filled in infantry and armor skills, where mobilization manpower is so severely short. It is also these skills that are most difficult to recruit for during peacetime. The Personnel Chiefs of the Army and Marine Corps, for example, testified that it is in these combat skills where the All-Volunteer Force has failed to supply sufficient recruits, and where current strengths of combat units is [*sic*] often woefully inadequate. In peacetime, although only 6 per-

> cent of Army enlisted skills are closed to women, fully 42 percent of all billets [assignments] filled by enlisted personnel in the Army are in specialties, skills or units not available to women. These include noncombat positions in close support units that could come under enemy fire. [26]

Appellees do not challenge (see page 22 & n.21, *supra*) current law and policy that exclude women from assignment to combat and, in the view of the Senate Armed Services Committee (S. Rep. No. 96-826, *supra*, at 157), that exclusion was "the most important reason for not including women in a registration system."

2. *Not only is there no need to draft women to staff noncombat positions, but the exclusion of women from those positions substantially serves the important governmental interest of flexibility in meeting a national military emergency*

a. The consistent testimony before Congress was to the effect that there is *no military need* to draft women. Although the then members of the Joint Chiefs of Staff acknowledged that a certain number of women conscripts could be accommodated to satisfy political concerns of equity (*Hearing on S. 109 and S. 226*, *supra*, at 15),[27] they uniformly advised Congress that, given combat restrictions, emergency military needs would not require the induction of women. *Id.* at 11, 14 (testimony of then Army Chief of Staff General Rogers) ("I am not prepared to

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[26] Throughout the testimony, this latter point was reiterated: that the percentage of job *categories* open to women is substantially higher than the percentage of *jobs* open to women, because the few categories from which they are excluded, *e.g.*, combat soldiers, are relatively populous. See, *e.g.*, *Hearings on S. 2294*, *supra*, at 1679 (testimony of Mr. Danzig). This differential would, of course, expand during a period of mobilization.

[27] The thrust of the relevant testimony was that the Armed Forces would be capable of absorbing 80,000 women out of a total pool of 650,000 inductees (the total number called for under the model European crisis mobilization scenario used by the Defense Department in making draft projections) within the first six months following mobilization. *Hearings on S. 2294*, *supra*, at 1661, 1828 (statements of Mr. Danzig).

agree that [women] should be drafted as of today, even for those skills for which they are today being utilized"), 14–15 (testimony of Air Force Chief of Staff General Lew Allen, Jr.) ("the Air Force now is able to meet its recruiting objectives for women with well qualified women. We would anticipate that in a period of draft, the Air Force would continue to meet its objectives in both men and women through volunteers. Therefore, we would not need a draft in order to meet the objectives that we have for both men and women"), 15 (testimony of Chief of Naval Operations Admiral Thomas B. Hayward) ("there would not be a requirement for women to be drafted at all to meet our wartime needs"), 15 (testimony of Marine Corps Commandant General Louis H. Wilson) ("I am sure that we can get volunteers as mentioned by the other Services"). Indeed, as then Army Chief of Staff General Bernard Rogers testified, "[w]e are at 103-percent strength [of women] in our Army Component * * *. There is an overstrength in service support manpower and it is in those types of functions that our women would be found * * *." *Hearings on S. 2294, supra*, at 1215.[28]

The district court viewed Congress' exclusion of women from the draft as inconsistent with the increase in the number of women volunteers that have been accepted into the Armed Forces over the past several years. J.S. App. 37a–38a. On the contrary, the increase in female volunteers has obviated the military need to draft women for

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[28] Appellees' reference (Motion to Affirm 10 n.17) to General Rogers' testimony (*Hearing on S. 109 and S. 226, supra*, at 14) that the Army was experiencing a 25% shortfall in recruiting women in fiscal year 1979 is misleading. First of all, the testimony was offered well before the close of the fiscal year on September 30, 1979. Second, appellees' reference ignores the general thrust of the testimony concerning the abundance of female volunteers, and, in particular, General Rogers' own contemporaneous testimony (*ibid.*) that "[t]his is a change * * * because prior to this year, we had no difficulty in filling our recruiting objectives for female soldiers." Finally, it ignores current Pentagon statistics that show that every service except the Army met or exceeded female recruitment needs in fiscal 1980, and that the Army met 95% of its quota. *Military Manpower Strength Assessment, Recruiting and Reenlistment Results for Fiscal Year 1980* (Oct. 31, 1980).

the occupational specialties from which they are not excluded (see statements of Joint Chiefs of Staff, *supra*). At the present time, there are approximately three times the percentage of women in the Army as there were during the peak of World War II (*Use of Women in the Military, supra*, (J.A. 153–154), and the number of women volunteers is projected to increase still further.[29] Indeed, expansion has been closely controlled by the Armed Services precisely to avoid exceeding the point of diminishing returns in emergency preparedness,[30] despite the fact that women have proven easier and more cost-effective to recruit than men. *Use of Women in the Military, supra* (J.A. 107–109, 133, 144–145).

Nor were these views of the military lost on Congress. As Representative Holt observed,

> [The conscription of women] is going to create numbers that you can't handle. There is no way in the world that you can take a percentage of women * * * and another percentage of men and try to sort out. You are going to be getting more volunteer women than you can possibly use in support roles.

Hearings on National Service Legislation Before the Subcomm. on Military Personnel of House Comm. on Armed Services, supra (J.A. 227–228).

The evidence before Congress thus demonstrated that expanding the draft to include women would not serve the overriding military need for combat and close combat support replacements, and that positions in which noncombat eligible women could be used in the event of a national emergency were already staffed by an abundance of volunteers. Congress acted in an eminently reasonable fashion,

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[29] See S. Rep. No. 96–226, *supra*, at 8; *Hearing on S. 109 and S. 226, supra*, at 48; *Presidential Recommendations, supra* (J.A. 57); *America's Volunteers, supra* (J.A. 82) ("more women want to enlist than are now accepted").

[30] See generally *Use of Women in the Military, supra*, including "Preface to Second Edition" (J.A. 99–104) and J.A. 154 ("the growth must be watched to ensure that the fighting capacity of the Army is strengthened, not weakened by additional enlisted women").

therefore, in refusing to amend a statute, whose primary purpose is to fulfill emergency defense needs, in a manner that would not address those needs.

b. Not only is there no need for a female draft to staff the noncombat positions, but the staffing of such positions with drafted women would detract from the flexibility necessary for an effective military response to a national emergency in a number of significant ways.

i. "In peace and war, significant rotation of personnel is necessary. We should not divide the military into two groups—one in permanent combat and one in permanent support." S. Rep. No. 96-826, *supra*, at 158. The rotation that is required is of two different types. First, the military must have available noncombat positions into which it routinely can transfer, or "rotate", combat personnel following their involvement in extended periods of conflict. When rotation is required, those previously staffing the noncombat positions are rotated into the positions held by their replacements. *Ibid.* This military necessity has resulted in very large numbers of noncombat positions being restricted to men—all of whom are combat trained and eligible regardless of actual assignment—even in the peacetime volunteer forces. See *Use of Women in the Military*, *supra* (J.A. 124-125); deposition testimony of Lieutenant General Moore, *supra* (J.A. 255-256).

A second aspect of the rotation requirement is the historically demonstrated need for the capability to "reach back" into the noncombat ranks during exigent circumstances. As then Army Chief of Staff General Rogers explained:

> One thing which is often lost sight of, Senator [Nunn], is that in an emergency during war, the Army has often had to reach back into the support base, into the supporting elements in the operating base, and pull forward soldiers to fill the ranks in an emergency; that is, to hand them a rifle or give them a tanker suit and put them in the front ranks.
>
> * * * * *

> Now, if that support base and that operating base to the rear consist in large measure of women, then we don't have that opportunity* * *.

Hearing on S. 109 and S. 226, supra, at 16.[31]

Thus, although not all conscripts would necessarily be placed in combat or rotation positions, their use in such positions is always a possibility. This consideration alone justifies Congress' decision to register only those who would be combat eligible. Cf. *Vance* v. *Bradley, supra*, 440 U.S. at 106–107 (State Department may impose blanket retirement age for all foreign service officers because "all of them are subject to assignment to" physically demanding foreign posts, irrespective of actual likelihood of such assignment).

ii. Congress also was concerned with the delay that might result from the Armed Services' inability to deploy 100% of a finite number of conscripted trainees to a combat or restricted rotation zone. In that context, the Senate Armed Services Committee stated (S. Rep. No. 96–826, *supra*, at 158) that "there are other military reasons that preclude very large numbers of women from serving. Military flexibility requires that a commander be able to move units or ships quickly." And as Admiral Hayward explained (*Hearing on S. 109 and S. 226, supra*, at 72):

> The national strategy for a conventional conflict is heavily dependent on mobilization and deployment rates.
>
> Timeliness of mobilization and deployment, and our ability to sustain the flow of manpower and material to the theater of conflict, are factors critical to the success of the strategy.

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[31] This point was vividly illustrated by the deposition testimony of Deputy Assistant Secretary of Defense and former European Division Commander Major General Tice (J.A. 281):

> During the Battle of the Bulge in 1944, whether you were already in or about to be drafted, everybody immediately went into combat, because it was critical we turn out all combat individuals. We even retrained all the clerks and cooks in France and sent them to the front line.

> Any inability of the Selective Service System to ensure the timely flow of forces to the war places the outcome of our strategy in serious question, and our national security in jeopardy.

Another military expert testified that "rapid deployability [is] our most urgent single need" and that present military strategies depend upon "greater flexibility to move forces rapidly from one theater to another and to tailor them for particular contingencies. * * * In other words, we would like to have a more *flexible*, more modern, more survivable force, before we need a bigger force." *Hearings on S. 2294, supra*, at 1233 (testimony of Under Secretary of Defense for Policy Robert W. Komer) (emphasis added). While the avoidance of delay might not provide a constitutional justification in another context, it is, indeed, a compelling governmental interest when troop deployment is involved, particularly where the statutory concern itself is for "mobilizing national manpower in the shortest practicable period * * *." See Falbo v. *United States, supra*, 320 U.S. at 554.

iii. Finally, Congress was of the view that devoting limited training facilities to noncombat eligible troops could have a critical, negative impact, particularly during periods of crisis. Marine Corps Commandant General Wilson advised the Senate Armed Services Committee that war efforts would be more constrained by limitations in "training capacity" than by personnel shortages. *Hearing on S. 109 and S. 226, supra*, at 73. General Rogers similarly testified that "[i]t is necessary to plan to keep the military training establishments filled to capacity in any situation requiring full mobilization." *Ibid.* Such testimony provided a firm basis for the Committee's conclusion that "[p]rocessing and training would be needlessly burdened by women recruits who could not be used in combat. If more people can be processed, they should also be directed to the combat positions which need to be filled." S. Rep. No. 96-226, *supra*, at 9.[32]

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[32] While the latter comment was made in the context of an assumption that men and women would be drafted in equal numbers, it ob-

c. The district court concluded (J.S. App. 43a) that the exclusion of women from the draft "is the antithesis of 'flexibility.'" However, while "women plus men" superficially might appear to enhance flexibility on an abstract registration role, the substitution of women for men in a finite pool of inductees subject to emergency deployment produces the opposite results described above. As Army Chief of Staff General Meyer summarized it, "the price you would pay [for conscripting females] would be the decreased effectiveness of the overall force" (J.A. 264). The evidence adduced during the hearings afforded Congress a sound basis for reaching the same conclusion.[33]

Thus, Congress concluded that substituting female for male conscripts not only would fail to enhance military preparedness, but, in fact, would detract from it by reducing the flexibility that the military needs to meet national emergencies. Because Congress' conclusion was not only rational, but closely and substantially related to the Act's critical purpose of "mobilizing national manpower in the shortest practicable period" with maximum effectiveness, *Falbo* v. *United States*, *supra*, 320 U.S. at 554, it passes constitutional muster even under the intermediate test of *Craig* v. *Boren*, *supra*.

In order to reach the contrary conclusion, the district court not only independently reweighed the evidence that

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viously applies as well to the extent that limited facilities would be devoted to the training of any number of women, who would not be eligible to staff combat positions, to the exclusion of men, who would be available for assignment wherever the military deemed them to be needed.

[33] Congress also noted that problems would arise in areas such as housing, but it considered these matters "less important than [the] military reasons" for not expanding registration and induction to include women. S. Rep. No. 96-226, *supra*, at 9. While the Senate Armed Services Committee also took into account the societal impact and perception of the registration and possible induction of women, it emphasized (S. Rep. No. 96-826, *supra*, at 157) that "[t]he policy precluding the use of women in combat is, in the committee's view, the most important reason for not including women in a registration system."

was Congress' to judge, but, moreover, it acted on the flawed presumption that an exclusionary system would be unacceptable if Congress were capable of tailoring registration and induction efforts into combat and noncombat pools, and thus conceivably achieving emergency preparedness "by less drastic means."[34] But this approach fails to distinguish between the "substantial relationship" test of *Craig* v. *Boren*, *supra*, and the strictest standards that this Court has applied only to statutory classifications implicating fundamental rights or suspect classifications such as race or religion. Compare *Dunn* v. *Blumstein*, 405 U.S. 330, 342-343 (1972), and *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1, 16-17 (1973), with *Dothard* v. *Rawlinson*, 433 U.S. 321, 334 n.20, 335 (1977) (state prohibition on female guards in all-male correctional institutions violates neither Title VII of the Civil Rights Act of 1964 nor the Equal Protection Clause of the Fourteenth Amendment where there is a "basis in fact" for anticipating that the employment of women in such positions would pose institutional security problems). This failure is particularly pernicious in the present case, where it results in the judiciary's intrusion into military matters that the Constitution expressly has entrusted to Congress.

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[34]Congress, on the other hand, believed that war is not a time for "an experiment * * * with unknown risk[s] * * *." S. Rep. No. 96-226, *supra*, at 9.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted.

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